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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 875

JOHN B. DES ROSIERS,

Petitioner,

vs.

FORD MOTOR COMPANY.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT AND BRIEF IN SUPPORT OF PETITION.

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PETITION FOR WRIT OF CERTIORARI

To the Honorable the Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

Your petitioner, John B. Des Rosiers, respectfully prays for a writ of certiorari to the Circuit Court of Appeals for the First Circuit to review the judgment of that Court entered on July 20, 1944.

A transcript of the record in the case, including the proceedings in said Circuit Court of Appeals, is furnished herewith in accordance with Rule 38 of the Rules of this Court.

Summary and Short Statement

The petitioner is the patent owner who, after having filed his application for patent and before issue, submitted

his invention to the Ford Motor Company, respondent herein. After rejecting his ideas and experimenting with various other types of four wheel mechanical brakes, the respondent deliberately adopted and used from 1932 to 1938 on its V-8 model a brake system embodying petitioner's invention, with utter disregard of petitioner's rights.

The question here is not one of patent monopoly, since the patent in issue expired in 1942, but had this gigantic respondent paid the struggling inventor a reasonable compensation for the appropriation of his invention, it is estimated the same would have approximated several millions of dollars.

The patentability of Claim 29 of petitioner's Reissue Patent *No. 20,086, dated September 1, 1936, over a questionable diagrammatic drawing in a printed publication is the primary issue involved herein. The subject matter of this claim in issue involves a four wheel mechanical brake system for automobiles, conceived when such brake structures for automobiles were in their infancy. The petitioner was the first to realize that if equal pressure were at all times applied through a common actuator (a new mode of operation), regardless of the angle of swivelling of the front wheels, all of the brakes would be worn equally and evenly (a new and beneficial result). The structure defined by this claim in issue provides brakes on all four wheels of the vehicle *all* of which are equally and simultaneously applied either upon application of a foot pedal *or* a hand lever, or both, through the medium of a *single controller shaft*, connected to both said foot pedal and hand lever.

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* By stipulation (R. p. 183) copies of the patent in suit and reference patents and publications were omitted from the printed transcript but form part of the record as physical exhibits. Therefore, copy of petitioner's patent and copy of the publication reference in issue are attached hereto as an appendage.

The case was tried before the District Court on October 1 and 2, 1942. The Court wrote no memorandum opinion, but filed findings of fact and conclusions of law (R. pp. 15-18) substantially to the effect that (1) the claim was invalid for lack of patentable invention over certain named patents (not naming the publication "Automotive Industries," relied upon by the Circuit Court of Appeals); (2) for anticipation by a foreign publication; and (3) because the reissue patent covered a different invention from the original patent.

After appeal to the Circuit Court of Appeals for the First Circuit, but before hearing, motions to remand were made before the Court of Appeals and before the District Court to reopen the case for introduction of additional evidence. The motions were denied. After the hearing before the Circuit Court of Appeals, an opinion, dated July 20, 1944, approximately six months after the hearing, was rendered, generally affirming the decision of the District Court, but holding the patent invalid on a new ground, i.e., anticipation by an article written by W. F. Bradley and F. Gerster appearing in the printed publication titled "Automotive Industries," dated June 16, 1921. The Lower Court, although having this reference before it, made no mention thereof in its decision.

In relying on this publication (copy in appendix and detailed sketches in supporting brief) as an anticipation of petitioner's invention, the Appellate Court made serious errors, apparent on the face of the opinion, as to both the construction and operation of the brake system illustrated in said publication and in failing to properly apply the reference to the claim of the patent in issue. The Court overlooked certain details of construction in the drawing of this reference, to wit, springs, and incorrectly interpreted the operation of the brake system by relying on a description (later repudiated by a co-author) which

when applied to the structure does not truly describe the operation. With a spring structure as shown, the brake system could not possibly operate as construed by the Court. This is clearly illustrated in sketches attached to petitioner's supporting brief, hereinafter referred to, which point out clearly the differences in structure, mode of operation and results achieved between the petitioner's patent and the reference relied on by the Court.

The Appellate Court further seriously erred in holding that an inspection of Figure 5 of the reference publication would show to any draftsman or mechanic what the plaintiff "says" is covered by his Claim 29. The issue involved *the claim* and the reference could not be interpreted to be an anticipation of the patent unless it is shown to be an anticipation of *the claim*. It is not a question of what someone "says is covered" by the claim, but what the claim, in fact, defines. The Court made no specific application of the reference to the claim in issue.

The Appellate Court further erred in holding that the publication reference discloses a structure which has the same mode of operation and produces the same results as that of the petitioner. This error is clear from an examination of the modes of operation of the two structures illustrated in the sketches forming a part of petitioner's supporting brief.

A petition for rehearing, after suitable extensions of time were granted, was filed on October 14, 1944, with a renewal of the motion to remand. The petition and the renewed motion were denied without comment by the Court of Appeals on October 19, 1944.

This Court has jurisdiction to review the judgment of the Circuit Court of Appeals on the authorities set forth in the Reasons Relied upon for Allowance of the Writ hereinafter presented.

Questions Involved

1. When a Circuit Court of Appeals has so far departed from the accepted and usual course of judicial proceedings by sustaining the decision of a Lower Court on invalidity but on grounds entirely distinct from those relied on by a District Court and only barely referred to in the record, denies a petition to remand and denies a petition for rehearing, should a petitioner be granted certiorari under the exercise of this Hon. Court's power of supervision, to appeal from, rebut and argue against the new ground of decision advanced for the first time by the Circuit Court?

2. Will this Court grant certiorari to correct errors of law clearly apparent on the face of the opinion and a clearly erroneous legal interpretation in the opinion of a skeletonized schematic sketch appearing in a publication?

3. Will this Court grant certiorari to correct a ruling violating the following well defined principles of patent law?

(a) The principle of patent law that an anticipation of a patent must clearly disclose the claimed invention beyond a reasonable doubt.

(b) The principle of patent law that a combination of elements producing a new mode of operation and a new and beneficial result is patentable.

(c) The principle of patent law that a disclosure in a prior publication, in order to defeat a patent, must present a substantial reproduction of the patented improvement in such full, clear and exact terms as to enable any person skilled in the art or science to which it appertains to make, construct and practice the invention so patented.

(d) The principle of patent law that it is not sufficient to constitute an anticipation of the patent that the device

relied upon might be modified to accomplish the functions performed by the patent in question, if it were not designed by its maker or adapted or actually used for the performance of such functions.

(e) The principle of patent law that a patent should be construed, if possible, to be upheld.

4. Will this Court permit the well defined principles of patent law, vital to the public interest, set forth in the previous question 3, to be slowly emasculated and eventually overruled in effect by failing in all instances to grant certiorari on the ground that these questions of mixed law and fact are merely questions of fact?

5. Will this Court grant certiorari when a Circuit Court of Appeals gives a rather warped interpretation of the structure, mode of operation and result of a disclosure in a publication, holding said publication to be an anticipation, when the Court of Customs and Patent Appeals, expert in patent matters, has discarded said publication as being of no pertinence in substantially a similar situation?

6. Will this Court grant certiorari without other conflict of decisions when the patent has expired since suit was instituted, and all other manufacturers, except respondent, long since discontinued use of the invention of said patent?

Reasons Relied On for Allowance of the Writ

The discretionary power of this Court is invoked upon the following grounds:

1. Because the Circuit Court of Appeals, in overruling all three grounds of the decision of the District Court and relying on a ground not relied on below, denying a petition for rehearing and denying a petition to remand, has so far departed from the accepted and usual course of judicial

proceedings as to call for an exercise of this Court's power of supervision, under authority of *Magnum Import Co.* v. *Coty*, 262 U. S. 159; *E. H. Ferree Co.* v. *United Shoe Machinery Co.*, 290 U. S. 614 and 708; and Supreme Court Rule 38, Par. 5 (b).

2. Because of errors clearly apparent on the face of the opinion of the Circuit Court of Appeals. The Appellate Court erred in holding that an inspection of Figure 5 of the reference publication would show to any draftsman or mechanic what the plaintiff "says" is covered by the claim, when the subject matter in issue is the *claim* itself and not what someone may say the claim covers. The Appellate Court erred in overlooking the operation of the springs on the rear wheel brake connections of the reference publication and further erred in failing to apply the reference publication specifically to the terms of the claim in issue which would have disclosed, as defined by the claim, that the reference did not reveal "means connecting said hand lever to said controller shaft to cause rotation thereof to apply (all) braking means" or "means connecting said foot pedal to said controller shaft to cause rotation thereof to actuate (all) said braking means". Had the reference publication been applied to the claim in issue, it would also have disclosed omission from said reference of the elements defined in the last five lines of the claim in issue which are directed to a specific lost motion connection. These errors, clearly apparent on the face of the opinion, apparent from the correct reading of the reference publication, and apparent from the reading of the claim in issue, call for correction under the supervisory power of this Court by authority of *Magnum Import Co.* v. *Coty*, Supra, and *E. H. Ferree Co.* v. *United Shoe Machinery Co.*, Supra, and Supreme Court Rule 38, Par. 5(b).

3. Because the decision of the Circuit Court of Appeals involves a Federal question decided in a way clearly in conflict with applicable decisions of this Court and of its own Circuit on the following well defined principles of law, under authority of Sup. Ct. Rule 38, Par. 5 (b); *McCormick* v. *Burnat*, 283 U. S. 784; *Miller* v. *Standard Nut Margarine Co. of Florida*, 284 U. S. 498; *Radio Corp. of America* v. *Raytheon Mfg. Co.*, 296 U. S. 459; and *DeForest Radio Co.* v. *General Electric Co.*, 283 U. S. 664.

(a) The principle of patent law that an anticipation of a patent must clearly disclose the claimed invention beyond a reasonable doubt, as set forth by this Court in *Barbed Wire case*, 143 U. S. 275; *Deering* v. *Winona Harvester Works*, 155 U. S. 300; *Adamson* v. *Gilliland*, 242 U. S. 350; *Eibel Co.* v. *Paper Co.*, 261 U. S. 60, has been ignored by the Circuit Court of Appeals.

(b) The principle of patent law that a combination of elements producing a new mode of operation and a new and beneficial result is patentable, as set forth by this Court in *Webster Loom Co.* v. *Higgins*, 105 U. S. 580, and *Diamond Rubber Co.* v. *Consolidated Power Co.*, 220 U. S. 428, has been ignored by the Circuit Court of Appeals.

(c) The principle of patent law that a disclosure in a prior publication, in order to defeat a patent, must present a substantial reproduction of the patented improvement in such full, clear and exact terms as to enable any person skilled in the art or science to which it appertains to make, construct and practice the invention so patented, as set forth by this Court in *Seymour* v. *Osborne*, 78 U. S. 516, and *Eames* v. *Andrews*, 122 U. S. 40, has been ignored by the Circuit Court of Appeals.

(d) The principle of patent law that it is not sufficient to constitute an anticipation of the patent that the device

relied upon might be modified to accomplish the function performed by the patent in question, if it were not designed by its maker or adapted or actually used for the performance of such functions, as set forth by this Court in *Topliff* v. *Topliff*, 145 U. S. 156, and *Krementz* v. *Cottle Co.*, 148 U. S. 562, has been ignored by the Circuit Court of Appeals.

(c) The principle of patent law that a patent should be construed, if possible, to be upheld, as set forth in the following cases from various Circuits, *Mossberg* v. *Nutter*, 135 Fed. 95; *Malignani* v. *Jasper Marsh Co.*, 180 Fed. 442, and *Sun Ray Corp.* v. *Bellows-Claude Neon Co.*, 49 Fed. (2d) 886, has been ignored by the Circuit Court of Appeals.

4. Because there is a conflict between the reasoning in decision of Circuit Court of Appeals of the First Circuit, in deciding the instant case, and the reasoning in decision of the U. S. Court of Customs and Patent Appeals in the case of *In Re Dodge*, 74 Fed. (2d) 756, in which the pertinency of the "Automotive Industries" reference publication was involved. The Dodge case involved an ex parte appeal by the party Dodge who was formerly a party to an interference in the United States Patent Office with the application of this petitioner. On appeal to the Court of Customs and Patent Appeals, the reference publication, "Automotive Industries", in the instant case was subject matter for consideration by the Court and was discarded as a reference for anticipation of the Dodge invention, notwithstanding the fact that the subject matter of the latter application was formerly in interference with the application of this petitioner. The expert Court of Customs and Patent Appeals, therefore, substantially disagrees with the Circuit Court of Appeals of the First Circuit in the effect of the weight to be given the reference publication in issue herein. This conflict warrants grant of the Writ of Certio-

rari, we submit, under authority of *Sanitary Refrigerator Co.* v. *Winters*, 280 U. S. 30, and Sup. Ct. Rule 38, Par. 5 (b).

5. Certiorari should be granted, since further conflict of decisions is now impossible, the patent in suit having expired and all manufacturers having discarded the subject matter of the patent, to wit, mechanical brakes, for hydraulic brakes. Authority therefor: *Paramount Publix Corp.* v. *American Tri-Ergon Corp.*, 294 U. S. 464; *Altoona Publix Theatres, Inc.* v. *American Tri-Ergon Corp.*, 294 U. S. 477; and *Mackay Radio & Telegraph Co.* v. *Radio Corp. of America*, 40 U. S. P. Q. 199.

Prayer

Wherefore, your petitioner respectfully prays that a Writ of Certiorari be issued under the seal of this Court directed to the U. S. Circuit Court of Appeals for the First Circuit to the end that this cause may be reviewed and determined by this Court in accordance with the principles of law heretofore announced by it and under its general supervisory powers to avoid the miscarriage of justice; that the judgment of the Circuit Court of Appeals be reversed and Des Rosiers Reissue Patent No. 20,086 of September 16, 1936, be held valid and infringed, and that the petitioner be granted such other and further relief as may seem proper.

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